National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

May 27, 2005 W-3001

CASES SUMMARIZED
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Press Release (R-2559): NLRB Promotes Industrial Democracy for 70 Years

Smurfit-Stone Container Corp., Container Division (12-CA-20804; 344 NLRB No. 82) San Fernandina Beach, FL May 16, 2005. Chairman Battista and Member Schaumber reversed the administrative law judge, deferred to an arbitrator's award, and dismissed the complaint alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing an attendance control policy without affording Electrical Workers IBEW Local 192A an opportunity to bargain about the changes or their effect on bargaining unit employees. Member Liebman dissented. [HTML] [PDF]

The Union claimed in its grievance that the Respondent's new attendance policy violated the parties' collective-bargaining agreement and past practice. The arbitrator found that the Respondent had the right to unilaterally implement the new policy and denied the grievance. The judge declined to defer to the arbitrator's award, concluding that the issues considered by the arbitrator were not parallel to the unfair labor practice issues and that the award was clearly repugnant to the Act. She decided that the Respondent's implementation of the new policy was an unlawful mid-term modification of the collective-bargaining agreement and a unilateral change in the employees' working conditions in violation of Section 8(a)(5).

Chairman Battista and Member Schaumber disagreed, finding deferral was warranted because the General Counsel failed to show that the statutory and contractual issues are factually dissimilar or that facts relevant to the unfair labor practice issue were withheld from the arbitrator. The majority also noted that the General Counsel did not allege that the arbitrator lacked an adequate factual basis to decide the relevant issue and, additionally, failed to show that the arbitrator's award was clearly repugnant to the Act. They noted it is uncontested that the arbitral process was fair and regular, that the arbitrator adequately considered the unfair labor practice issue, and that the parties presented the arbitrator generally with the facts relevant to resolving the unfair labor practice issue. The majority said "an interpretation of the arbitral opinion is that the management-rights clause gave the Respondent the right to act" and accordingly, it is consistent with the Act and is not clearly repugnant to the Act. In support of its conclusion, the majority noted that the General Counsel failed to prove that the arbitrator did not rely upon the management-rights clause.

In dissent, Member Liebman stated that there is no basis for deferring to the arbitration decision, and that the Board should reach the merits and find a violation of Section 8(a)(5), essentially for the reason the judge did. She wrote: [T]he majority's decision permits a violation of the Act to go unremedied, based on an arbitrator's decision with a premise antithetical to the Act. . . . The result represents exactly the abdication of responsibility that the Board had resolved to void, even while adopting a liberal policy of deferral. See *United Technologies Corp.*, 268 NLRB 557, 560 (1984)."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Electrical Workers IBEW Local 1924; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Jacksonvillle on July 23, 2003. Adm. Law Judge Margaret G. Brakebusch issued her decision Sept. 11, 2003.

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SNE Enterprises, Inc. (9-RC-17883; 344 NLRB No. 81) Huntington, WV May 17, 2005. Applying *Harborside Healthcare, Inc*., 343 NLRB No. 100 (2004), which clarified the standard for determining when supervisory prounion activity is objectionable, Chairman Battista and Member Schaumber granted the Employer's request for review of the Regional Director's Second Supplemental Decision and Certification of Representative. They remanded the proceeding to the Regional Director for reconsideration of the supervisors' prounion activity, including but not limited to whether their solicitation of authorization cards constitutes objectionable conduct, without prejudicing whether any of the conduct, alone or in context, is objectionable and warrants a new election. Member Liebman dissented. [HTML] [PDF]

Contrary to their colleague, Chairman Battista and Member Schaumber found that retroactively applying the Board's decision in *Harborside* to this case is consistent with the *Harborside* ruling itself and longstanding Board practice and would not result in manifest injustice. They said that the Board has already applied the *Harborside* standard retroactively, in the *Harborside* decision itself, and that the dissent in that case did not even argue the point. The majority noted that the Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage." See *Aramark School Services*, 337 NLRB 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006-1007 (1958)).

The majority acknowledged that setting aside a union victory in an election does represent a setback for the union, saying: "However, at bottom, it is employee free choice that is at issue, not the victory or loss of any particular party. That free choice can be undermined by supervisory conduct. In any event, a union's election loss need only be temporary. If the employees freely vote for the union in a second election, the union will have its certification."

Based on her dissent *in Harborside*, Member Liebman found that the conduct engaged in by the supervisors in this case was clearly not objectionable. She said that it would work a manifest injustice on the parties to retroactively apply the new rule to this case or any other case that was pending before *Harborside* was decided and while the Board's settled rules were in effect. Accordingly, Member Liebman would affirm the Regional Director's decision and would not remand the proceeding for hearing.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Symphony Cleaners 44, Inc. (2-CA-36133; 344 NLRB No. 84) New York, NY May 18, 2005. In view of the Respondent's failure to comply with the requirements of a settlement agreement, the Board granted the General Counsel's motion for summary judgment, finding that the Respondent failed to remit the agreed-upon backpay amounts due employees Piedad Granados and Maria Rojas, failed to remove from its files all references to their discharges, and failed to post the notice to employees. Pursuant to the terms of the default provision of the settlement agreement, the General Counsel revoked the settlement agreement and reissued the complaint. [HTML] [PDF]

The Board affirmed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their concerted activities on behalf of Association Tepeyac, Project Chamba; and violated Section 8(a)(3) and (1) by discharging Granados and by transferring Rojas to another facility, reducing her hours of work, and causing her termination.

(Chairman Battista and Members Liebman and Schaumber participated.)

General Counsel filed motion for summary judgment January 31, 2005.

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Teamsters Local 115 (4-CB-9164, 9175; 344 NLRB No. 83) Philadelphia, PA May 16, 2005. The Board affirmed the administrative law judge's decision and held that the Respondent violated Section 8(b)(1)(A) of the Act when its agent, Charles Argeros, physically assaulted and threatened dissident union member Joseph J. Fanelli because of his activities that were designed to protest, criticize, or question the policies and practices of the Union and its leaders. [HTML] [PDF]

No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent violated Section 8(b)(1)(A): (1) when its agent, Patrick Stasen, allegedly brandished an iron poker in front of employee Clinton Barnes and threatened to hit Barnes with the poker; and (2) when Argeros allegedly bumped Barnes and incited others to jump on him.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Joseph J. Fanelli and Clinton Barnes, Individuals; complaint alleged violation of Section 8(b)(1)(A). Hearing at Philadelphia, Oct. 19-21, 2004. Adm. Law Judge David L. Evans issued his decision March 1, 2005.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Arizona Mechanical Insulation, LLC (Asbestos Workers Local 73) Phoenix, AZ May 12, 2005. 28-CA-18622E; JD(SF)-39-05, Judge Thomas M. Patton.

Kids Automotive, Inc./ Kids Financial Inc./ Brandon Financial, Inc. (an Individual) Denver, CO May 13, 2005. 27-CA-18809; JD(SF)-41-05, Judge Albert A. Metz.

Park 'N Go of Minnesota LP (Teamsters Local 120) Minneapolis, MN May 17, 2005. 18-CA-17473, 18-RC-17320; JD(ATL)-18-05, Judge Keltner W. Locke.

Positive Electrical Enterprises, Inc. (Electrical Workers [IBEW] Local 43) Mattydale, NY May 17, 2005. 3-CA-25037; JD(ATL)-19-05, Judge Margaret G. Brakebusch.

Electrical Workers IBEW Local 45 (Adelphia Communications Corp.) Yucca Valley, CA May 17, 2005. 31-CB-11695; JD(SF)-42-05, Judge William G. Kocol.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

RJMS Corp. d/b/a Toyota Material Handling Northern California, Fresno, CA 32-RC-5326, May 18, 2005 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND DIRECTION OF SECOND ELECTION

Safety Kleen Systems, Inc., South Plainfield, NJ, 22-RC-12532, May 18, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Cornell University d/b/a National Astronomy and Atmosphere Center, Arecibo, PR, 24-RC-8419, May 16, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Chef Solutions, Inc., Wheeling, IL, 13-RC-21322, May 18, 2005 (Chairman Battista and Members Liebman and Schaumber)

Healthshare, Inc. d/b/a Northern Michigan Regional Health System, Petoskey, MI, 7-RC-22854, May 18, 2005 (Chairman Battista and Members Liebman and Schaumber)

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Miscellaneous Board Orders

ORDER [amending decision to permit the clerical classification to vote by challenged ballot and denying request for review in all other respects]

Tire Centers, LLC, d/b/a TCI Tire Centers, North Kansas City, MO, 17-RC-12341, May 18, 2005 (Chairman Battista and Members Liebman and Schaumber)

ORDER [remanding proceeding to Regional Director for reconsideration of the supervisors' pro-union activity]

Madison Square Garden, CT, LLC, Hartford, CT, 34-RC-1812, May 20, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

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